**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED SEPTEMBER 22, 1998**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-5725 & 98-5153

NORBERT S. BELFER; CORINNE BELFER,
AS EXECUTRIX OF THE ESTATE OF
NORBERT S. BELFER, DECEASED

v.

ELAINE ZEE, INDIVIDUALLY AND AS PLAN ADMINISTRATOR OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, TRUSTEE OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC.

Appellants No. 97-5725

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NORBERT S. BELFER, Deceased; CORINNE BELFER, As Executrix of the Estate of Norbert S. Belfer, Deceased

v.

*Appendix A*

ELAINE ZEE, Individually and as Plan Administrator of Lighting World, Inc. Employees Profit-Sharing Plan; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, Trustee of Lighting World, Inc. Employees Profit-Sharing Plan; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC.

Appellants No. 98-5153

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 97-1445)

Argued August 3, 1998
Before: NYGAARD, ALITO, and RENDELL,
*Circuit Judges*

(Opinion Filed: SEP 22 1998)

OPINION OF THE COURT

RENDELL, Circuit Judge

Appellants, Elaine Zee *et al.*, challenge the district court's grant of summary judgment in favor of Corinne Belfer.[1] We will affirm the grant of summary judgment in part and reverse in part. Further, we will remand the issue of attorneys' fees to be reconsidered by the district court in light of this opinion.

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1. The district court had jurisdiction through 28 U.S.C. § 1331 as this action arises under ERISA. This court reviews the appeal from the district court's final order pursuant to 28 U.S.C. § 1291. The district court's grant of summary judgment is subject to plenary review. The district court's decision to award attorneys' fees is reviewed for abuse of discretion.

*Appendix A*

I.

Norbert Belfer and Linda Merling were married for thirty years and had three children: Elaine Zee, Bruce and Mark.[2] Until 1994, Norbert and Linda owned and operated a business called Lighting World, Inc. ("LWI"), a closely held corporation; the Board of Directors consisted of Norbert, Linda, and their children, Elaine and Bruce, both of whom are LWI employees. The couple divorced in 1990 and signed a settlement agreement which related to the distribution of their marital property. In the specific provision of the agreement at issue in this case, the parties agreed to make their children "equal co-beneficiaries" of their LWI profit-sharing plans. Norbert subsequently married Corinne.

From the time of the divorce until April of 1994 Norbert Belfer continued as CEO and 50% shareholder of LWI. At that time, Norbert claimed that he had been forced out of the company and initiated legal proceedings against the other LWI Directors in state court. In 1996, the New Jersey Chancery Court found that Norbert Belfer had been removed from his position and was no longer employed by Lighting World. On December 4, 1996, Norbert Belfer contacted Elaine Zee, who had become the plan administrator for LWI's benefits, and requested an immediate lump-sum distribution of the proceeds of his profit-sharing plan on the basis that he had been terminated.[3]

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2. As the procedural history of this case is recited in the district court opinion, we need not review that history here.

3. In January of 1997, Norbert Belfer submitted a beneficiary designation form to Zee naming Corinne Belfer as his primary beneficiary and his estate as the contingent beneficiary.

A few weeks later Norbert Belfer learned that he was suffering from cancer. He again contacted Zee and requested distribution of the proceeds of the account on the basis of disability. In February of 1997, Zee denied both of Norbert Belfer's requests for disbursement of the profit-sharing funds.

Norbert Belfer brought suit in federal court challenging Zee's refusal to disburse plan funds to him. In April the district court ordered the parties to adopt an interim agreement concerning the provision of funds sufficient to meet the Norbert's medical needs. Norbert Belfer died on April 28, 1997. Subsequently, Corinne Belfer was substituted for Norbert Belfer pursuant to Federal Rule of Civil Procedure 25(a)(1). Both Corinne Belfer and Zee filed motions for summary judgment. The district court granted Corinne Belfer's motion.

Appellants contest the district court's grant of summary judgment and argue that Norbert Belfer was not entitled to the proceeds of the plan because he had entered into a property settlement agreement ("PSA") in 1990 which constituted a qualified domestic relations order ("QDRO") under ERISA. Appellants argue that a provision in the PSA stating that all of the proceeds of the account should go to Norbert Belfer's three children rather than to Mr. Belfer should be recognized under the QDRO exception to ERISA's prohibition against alienation.

Under ERISA, profit-sharing plans are treated like pension plans. Generally, ERISA prohibits the alienation of pension benefit plans. 29 U.S.C. § 1056(d)(1). The purpose of this "spendthrift" provision is to ensure that pension plans are not transferred to third parties thus depriving the plan participants of their retirement savings. Therefore, agreements which assign rights in the proceeds of pension plans are generally unenforceable.

However, in 1984 Congress enacted the Retirement Equity Act ("REA"). The purpose of the legislation was "primarily to safeguard the financial security of widows and divorcees." *Ablamis v. Roper*, 937 F.2d 1450, 1453 (9th Cir. 1991). The Act required pension plans to provide automatic survivor benefits to spouses of deceased plan participants. 29 U.S.C. § 1055. Further, the Act created an exception to the antialienation provisions of ERISA whereby the proceeds of a pension plan could be alienated or assigned pursuant to a "qualified domestic relations order" ("QDRO"). 29 U.S.C. § 1056.

In order to qualify as a QDRO, an agreement must include:

> (1) the name of the participant and the name and mailing address of an alternate payee covered by the order,
>
> (2) the amount or percentage of benefits payable to an alternate payee or a manner of determining the amount or percentage,
>
> (3) the number of payments or period affected by the order,
>
> and
>
> (4) the plan to which the order applies.

§ 1056(d)(3)(B)(i)(I). These requirements are designed to make certain that alienation is intended, and to alleviate the burden and risk of interpretation that vague provisions may create for those administering the plans. *See Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d at 1080, 1083 (7th Cir. 1994).

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The PSA contained the following language:

> The parties specifically waive any and all right that they may have in the other's employee profit sharing plan as of the date of this agreement. Each party shall make the three children born of the marriage equal co-beneficiaries, per stirpes of his/her respective employee profit sharing plan. The employee benefit plan is known as Lighting World, Inc. Employee Profit Sharing Trust Fund.

Appellants argue that this agreement constitutes a QDRO and that Norbert Belfer irrevocably assigned the profit-sharing plan benefits to his children. Corinne Belfer contends that the agreement does not meet the QDRO requirements and thus the PSA is unenforceable pursuant to ERISA's antialienation provisions.

The district court held that the failure of the PSA to list the names and addresses of the alternate payees was not fatal because all parties — including the plan administrator — were aware of the location of the beneficiaries. The court similarly found that all parties knew the profit-sharing plan to which the PSA referred so its misidentificaiton in the PSA did not necessarily defeat the establishment of a QDRO. The court also determined that the words "equal co-beneficiaries" clearly established that each child was to receive a third of *all* of the proceeds of the plan. *See Metropolitan Life Ins. Co. v. Person*, 805 F. Supp. 1411, 1416 (E.D. Mich. 1992). However, the district court then held, as is discussed below, that the PSA was not a QDRO because it failed to adequately set forth the number of payments or the period affected by the order and these terms could not be inferred from the circumstances of the case. We agree.

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Appellants contend that the language of the agreement indicates that the parties intended the PSA to create an *inter vivos* assignment and that the number of payments and time of payment could be determined by looking at the plan documents which required that the plan pay out benefits in a lump-sum upon the occurrence of certain events — death, retirement, disability.

We note first that the intent of the parties is not dispositive in determining whether a PSA qualifies as a QDRO. *See Hawkins v. Comm'n of Internal Revenue*, 86 F.3d 982, 989 (10th Cir. 1996). The language of the agreement must be clear, and here it is not. The PSA fails to specify the number of payments or the period affected by the order as required by statute. There is no indication of when the funds are to be transferred to the three children or when their purported interest is to arise. In fact, the lack of clarity is manifest by the instant litigation. To the extent that appellants' argument relies on reference to the plan documents to supply missing terms, the plan does not address appellants' rights and is of no assistance. Further, even if the intent of the parties or later actions of those with an arguable interest in the funds could elucidate the parties' language, we find nothing to assist our search for clarity.[4]

The policy behind the antialienation provisions of ERISA and the narrow QDRO exception also supports this outcome.

4. Certainly, Norbert Belfer's requests for disbursement of the profit-sharing funds upon his termination and disability demonstrate that he believed he had a right to the money during his lifetime. In addition, Zee permitted Norbert Belfer to borrow against the plan indicating that she believed that he still had a right to money in the fund. This action conflicts with appellants' current assertion that the PSA clearly evidences an intent to create a lump-sum transfer of the proceeds of the account upon Norbert Belfer's death, retirement or disability.

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Under the plan at issue in this case, a participant may collect pension benefits upon disability, retirement, termination or death. Appellants argue that the same events should have triggered the transfer of funds to the children. This result runs counter to the entire policy behind ERISA and the antialienation provisions that insures that the employee who has earned these benefits has access to them when in need. The fact that the district court in this case had to fashion an interim agreement to provide for the costs of Norbert Belfer's medical care during the period of this litigation underscores that such a result would be not be consistent with ERISA's general goals of ensuring that workers have adequate income during their retirement or periods of disability.

As the district court noted, courts which have accepted as QDROs contract provisions similar to the one in this PSA have generally done so in cases involving life insurance benefits or the immediate distribution of pension benefits pursuant to an alimony or child support agreement. Op. at 11 (citing cases). Here, we agree that in order to accept the position that the funds should have be transferred to the beneficiaries upon Norbert Belfer's termination, retirement or disability, "the court would have to find that the parties intended to convert the deceased's pension account into a quasi-trust fund for the children, a fund which continued to accrue monies and was completely inaccessible to the deceased." Op. at 12. As the language of the agreement at issue in this case does not clearly set forth the requisite payments or the period affected by the order, we will affirm the district court's holding that the PSA does not constitute a QDRO.[5]

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5. Because we have determined that the PSA fails to meet the requirements of a QDRO, we need not address the argument raised by

(Cont'd)

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II.

The district court also determined that the plan administrator, Zee, breached her fiduciary duty in failing to distribute the funds to Norbert Belfer *inter vivos* when he became disabled. Our review of the district court's legal conclusion is plenary.

Because the plan administrator was had discretion to interpret and construe the terms of the plan, the court must determine whether the denial of benefits constituted an abuse of her discretion in acting as a fiduciary. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).[6] However, when, as in this case, the plan administrator has an obvious conflict of interest, other circuits have held that this analysis is modified in that "when a plan participant demonstrates a substantial conflict of interest on the part of the fiduciary, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted with self-interest." *See Brown v. Blue Cross & Blue Shield of Alabama*, 898 F.2d 1556, 1566 (11th Cir. 1990); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984 (6th Cir. 1991). In order to make this assessment, the court must first evaluate the claim de novo and decide if the fiduciary's interpretation of plan provisions was wrong. If the decision was wrong, the

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(Cont'd)
appellees that the three children were not dependents at the time the PSA was entered into and therefore could not qualify as "alternate payees" under the statute.

6. A plan administrator has an obligation to execute her duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(A).

court must determine whether the decision was unreasonable. If the decision was wrong, but reasonable, the court will then decide if the administrator's position advanced the interest of the administrator at the expense of the affected party. Op. at 15-16.

Norbert Belfer's initial request for disbursement of the funds was based on the state court finding that he had been terminated from his job at LWI. The district court properly concluded that Zee did not act unreasonably in denying the request based on the fact that the state court decision was being appealed.

The district court then evaluated Norbert Belfer's second request — based on his disability. Using the analysis set forth above, the court found that Zee was "wrong" in failing to disburse the funds since Norbert Belfer had provided proof of his disability which satisfied the plan's definition. Zee gave two reasons for the denial: (1) that Norbert Belfer was in fact employed at another business and (2) that no funds could be disbursed until the QDRO issue was resolved. The district court found the first reason for denial to be unreasonable and tainted with self-interest as Zee had no proof of Norbert Belfer's employment and did not seek to conduct a fuller investigation. Thus, the district court found that Zee had violated her fiduciary duty.

However, in so holding, the district court never considered Zee's second reason for denying the benefits — that she was awaiting the resolution of the QDRO issue. The court's earlier determination that the PSA was not a QDRO did not obviate the need to consider whether the QDRO conflict served as a reasonable basis upon which to deny Belfer's request. In fact, we find that the QDRO question was a legitimate one and that,

therefore, Zee acted reasonably in deferring payment of the proceeds.[7] A plan administrator has a duty to pay the appropriate beneficiary, not to pay the first one to make a claim. *See Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1121-22 (10th Cir. 1991). As the district court recognized in its opinion regarding attorneys' fees, it is likely that no matter what decision Zee had made about disbursement of the profit-sharing account, the QDRO issue would eventually have been resolved through litigation. Zee was justified in not making a disbursement until the issue was decided. Accordingly, we will reverse the district court's determination that Elaine Zee breached her fiduciary duty by not distributing the proceeds to Norbert Belfer upon his disability.

III.

Attorneys' fees and costs may be awarded to prevailing parties in ERISA actions at the discretion of the court. 29 U.S.C. § 1132(g)(1). The district court awarded the plaintiff, appellee here, attorneys' fees of $46,730.23. We review for abuse of discretion. *See Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1273 (3d Cir. 1992).

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7. As we have determined that Zee did not breach her fiduciary duty by failing to disburse the funds, we need not address Zee's argument that a "safe harbor provision" protects her from liability. Zee contends — as she did before the district court — that this provision allows her an 18-month period from the date on which the first payment was to be made in which to determine if the QDRO was valid. 29 U.S.C. § 1056(d)(3)(H)(v). The district court found, however, that as plan administrator Zee had an obligation to determine "within a reasonable period" whether the QDRO was valid and to "notify the participant and each alternate payee of such determination." 29 U.S.C. § 1056(d)(3)(G)(i)(II). We do not reach this issue here.

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We consider the following factors when reviewing a district court's decision to award attorneys' fees under ERISA:

1) the offending parties' culpability or bad faith;

2) the ability of the offending parties to satisfy an award of attorney' fees;

3) the deterrent effect of an award of attorneys' fees against the offending parties;

4) the benefit conferred on members of the pension plan as a whole; and

5) the relative merits of the parties' positions.

*See Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983). Each factor should be evaluated "in balance and relationship to the others." *Ellison*, 956 at 1278. In considering these factors, the district court found that the first three weighed in favor of the plaintiff, the last two in favor of the defendant, and then awarded attorneys' fees to the plaintiff.

In evaluating the first factor, the court found that because Zee had "acted under the influence of an impermissible conflict of interest" and had been negligent in not determining whether the PSA constituted a QDRO, she acted culpably. However, as we have determined that Zee did not violate her fiduciary duty, we believe that the district court erred in weighing this factor heavily against appellants. We note that while it is true that bad faith is not required under this factor, in other cases in which culpability was found, the courts used words like "frivolous" and "meritless." *See, e.g., Monkelis v. Mobay*

*Chem.*, 827 F.2d 935 (3d Cir. 1987); *Tobin v. General Elec. Co.*, 1996 WL 730551 (E.D. Pa. Dec. 11, 1996). We will remand for the district court to re-examine the *Ursic* factors and perform again an assessment of their relative weight, in light of our holding as to the absence of a breach of fiduciary duty on Zee's part.[8]

We will affirm the judgment of the district court with respect to the determination that the agreement at issue does not qualify as a QDRO under ERISA. We will reverse the district court's finding that Zee breached her fiduciary duty. We will remand the case for the district court to address the issue of attorneys' fees consistent with this opinion.

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TO THE CLERK OF THE COURT:

Please file the foregoing not-for-publication opinion.

s/ [illegible]
Circuit Judge

DATED: SEP 22 1998

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8. We also note that the court's evaluation of the third factor — deterrent effect — is somewhat strained. Although the court recognized that because of "[t]he unique factual and legal issues presented by this case" the likelihood of a similar situation arising again was very small. The court, citing *McPherson v. Employee's Pension Plan of American Re-Insurance Co.*, 33 F.3d 253, 254 (3d Cir. 1994), nevertheless found that an award of attorneys' fees could serve as a deterrent in this case. To the extent that the district court found deterrence here, it is present in every case. By listing deterrence as a separate factor, it seems clear that the *Ursic* court was referring to some additional element of deterrence beyond that which is inherent in every adverse judgment.

## APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

97-5725 & 98-5153

NORBERT S. BELFER; CORRINE BELFER,
AS EXECUTRIX OF THE ESTATE OF
NORBERT S. BELFER, DECEASED

v.

ELAINE ZEE, INDIVIDUALLY AND AS PLAN ADMINISTRATOR OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, TRUSTEE OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC,

Appellants No. 97-5725

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NORBERT S. BELFER, Deceased; CORRINE BELFER,
As Executrix of the Estate of Norbert S. Belfer, Deceased;

v.

ELAINE ZEE, Individually and as Plan Administrator of Lighting World, Inc. Employees Profit-Sharing Plan; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, Trustee of Lighting World, Inc. Employees Profit-Sharing Plan; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC.,

Appellants No. 98-5153

*Appendix B*

Present: Nygaard, Alito, and Rendell, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 3, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 24, 1997, be, and the same is hereby affirmed in part and reversed in part. The cause is remanded to the District Court to address the issue of attorneys' fees consistent with the opinion of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: September 22, 1998

## APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED SEPTEMBER 24, 1997

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 97-1445

CORINNE S. BELFER, Individually and as Executrix for the Estate of Norbert S. Belfer

Plaintiff,

v.

ELAINE ZEE, Individually and as Plan Administrator of Lighting World, Inc. Employees Profit-Sharing Plan, DELAWARE CHARTER GUARANTEE & TRUST COMPANY, Trustee of Lighting World, Inc. Employees' Profit-Sharing Plan, BRUCE BELFER, LINDA MERLING, MARC BELFER, and LIGHTING WORLD, INC.,

Defendants.

OPINION

THOMPSON, CHIEF JUDGE

This matter is before the Court on the plaintiff's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Defendants have filed a cross-motion for summary judgment.

*Appendix C*

For the reasons set forth below, the Court will grant the plaintiff's motion for summary judgment. Defendants' cross motion for summary judgment will be denied.

*Background*

*I. Procedural History*

Plaintiff Corinne S. Belfer instituted this action against her late husband's employer to recover the proceeds of his pension account. The locus of the legal issues present in this case arise from a property settlement agreement ("Agreement") entered into by the plaintiff's late husband Norbert S. Belfer ("the deceased") and his former spouse, defendant Linda Merling on August 24, 1990 as part of a marital dissolution. This Agreement was subsequently incorporated by reference into the final divorce decree entered on September 4, 1990. The Agreement addressed the distribution of the marital property including ownership and operation of the family-owned business Lighting World, Inc. ("LWI"), business property, and other jointly-owned assets. The LWI Board of Directors then consisted of the deceased, defendant Merling, and their children, defendants Elaine Zee (nee Belfer) and Bruce Belfer, both of whom are also employees of LWI. Pursuant to the terms of this Agreement, the deceased continued as the CEO, a director and fifty percent shareholder of LWI from the time of the divorce decree until April of 1994. As a result of certain internecine disputes, the deceased initiated legal proceedings against LWI on April 24, 1994 in the New Jersey Superior Court, Chancery Division, alleging that he had been ousted from his position as CEO of LWI in violation of the Agreement. After protracted litigation spanning over two and one-half years, the Chancery Court upheld the removal of the deceased from his position as

CEO in an opinion rendered on May 28, 1996. A final decree implementing the bench opinion was entered December 16, 1996.

In a letter dated December 4, 1996, the deceased contacted defendant Zee in her capacity as Plan Administrator of the LWI Employees Profit-Sharing Plan ("Plan"), currently administered by defendant Delaware Charter Guarantee & Trust Company, requesting an immediate lump sum disbursement of the proceeds of his profit-sharing account on the grounds that the previous litigation constituted a termination of his employment with LWI and therefore constituted a distributable event under the terms of the Plan. Shortly after dispatching this letter, the deceased learned that he was suffering from terminal pancreatic cancer. In a letter dated December 26, 1996, the deceased renewed his request for a lump sum disbursement on the additional grounds that he suffered from a "disability" within the meaning of the terms of the Plan that entitled him to such a distribution upon demand. On January 6, 1997, the deceased submitted a Beneficiary Designation Form to defendant Zee naming the plaintiff as his primary beneficiary and his estate as a secondary or contingent beneficiary. On February 16th, the deceased received confirmation from the Social Security Administration that he was found to be totally disabled and eligible for disability benefits.

By a letter dated February 18, 1997, defendant Zee denied the initial disbursement request relating to the alleged termination of employment. Subsequently, defendant Zee also denied the deceased's second request for a disbursement on the grounds of disability by letter dated February 28, 1997. In response to these denials, the deceased initiated proceedings before this Court on March 14, 1997 for a preliminary

mandatory injunction and/or temporary restraining order enjoining defendant Zee to immediately pay to the deceased the requested disbursement. Arguments from both parties were heard on March 27, 1997. Due to the emergent nature of the relief requested, the parties agreed to settle the matter insofar as the dispute related to the deceased's ability to pay for his medical care. In an Order entered April 29, 1997, this Court denied the deceased's motion and ordered that the parties enter into and adopt an interim agreement for the provision of funds sufficient to meet the deceased's medical needs. The deceased passed away on April 28, 1997. Pursuant to Federal Rule of Civil Procedure 25(a)(1), Corinne S. Belfer, as Executrix of the Estate of Norbert S. Belfer, was substituted for the deceased in this action.

*II. The Plan*

The plan at issue in this action is a 401(k) profit-sharing plan under which the deceased deposited up to 10% of his annual compensation into an interest-bearing account. These funds were supplemented by fixed contributions by the employer LWI. As of June 30, 1997, the deceased individual account contained a balance of approximately $265,000. *See* Zee Affidavit, pg. 2. As a threshold matter, there is some dispute by the parties as to which plan should apply in the present circumstances. When the property settlement agreement was entered into by the parties in 1990, the LWI plan was administered by Central Jersey Bank & Trust Company ("Central Jersey Plan"). The Central Jersey Plan had an effective date of January 1, 1987. In 1992, the Central Jersey plan was amended to reflect certain changes in LWI operations. The Amended plan had an effective date of January 1, 1992. In 1995, Central Jersey was bought by NatWest Bank which declined to

continue as Trustee of the plan. Upon advice from NatWest, defendant Zee undertook to change the LWI plan to one offered by Northwestern National Life ("Northwestern Plan") administered by Union Bank & Trust. Plaintiff alleges that this change occurred without the knowledge of the deceased despite the fact that he was still a director of LWI. Plaintiff further alleges that the deceased was unaware of this change until February of 1997. Subsequent to the adoption of the Northwestern Plan, the plan was again changed to one administered by defendant Delaware Charter Guarantee & Trust Company ("Delaware Plan"). Putting aside plaintiff's assertions regarding the motives of the defendant in changing the plans, plaintiff has not alleged, nor has a review of the named plan documents revealed, any substantive changes in the terms of the LWI plan which affect the rights of the deceased or alter the issues in this case. Therefore, for purposes of the instant action, all references to the LWI Plan will refer to the current plan administered by Delaware Charter.

Plaintiff alleges that she is entitled to receive the accrued plan benefits in her late husband's account as his legally designated primary beneficiary under the Plan. In the alternative, plaintiff asserts that defendant Zee wrongfully denied the deceased's requests for an inter vivos distribution of the subject Plan benefits and that said benefits should be paid to his estate. Defendants counter that neither the deceased nor the plaintiff are entitled to the subject benefits because the deceased irrevocably assigned the subject Plan benefits to his three adult children in the Property Settlement Agreement between the deceased and defendant Linda Merling. Defendants further maintain that said Agreement constitutes a qualified domestic relations order ("QDRO") under Section 206 of the Employee Retirement Income Security Act of 1974 ("ERISA"),

and as such preempts both the language of the Plan and provisions of ERISA itself which might otherwise be applicable. Both parties concede that the LWI Plan is an employee benefits plan within the meaning of 29 U.S.C. §1002(3)(2)(A)(ii) and is to be interpreted in accordance with all applicable provisions of ERISA. Both parties also agree that the Plan Administrator would be obligated to distribute the subject benefits in accordance with the terms of a valid QDRO.[1]

*Discussion*

*1. Summary Judgment Standard*

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied* 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not enough to simply show that some "metaphysical" doubt exists as to the material facts. *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Further,

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1. Under the express provision of 29 U.S.C. §1056(d)(3)(A), the Plan Administrator of all ERISA regulated plan is bound to adhere to the terms of a valid QDRO: "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."

the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Liberty Lobby*, 477 at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. *See Country Floors, Inc. v. A Partnership Composed of Gepner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991).

In deciding a motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). It is in this light that the Court must undertake an analysis of the facts of this case.

*II. ERISA Standards*

The Federal Employee Retirement Insurance Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 9 U.S.C. § 1001 et seq. (1978), is a broad scheme of federal regulations designed to safeguard the interests of employees in employee benefit plans. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). ERISA was enacted for the purpose of protecting and ensuring " 'the continued well-being and security of millions of employees and their dependents who rely upon retirement plans.' " *Ablamis v. Roper*, 937 F.2d. 1450, 1453 (9th Cir. 1991). In furtherance of this goal, ERISA contains an authoritative anti-alienation or spendthrift provision: "[e]ach pension plan shall provide that benefits provided under the plan

may not be assigned or alienated." 29 U.S.C. §1056(d)(1). In accordance with ERISA's strong preemption clause,[2] the anti-alienation provision was interpreted by numerous federal courts to preempt the efforts of numerous states to fashion equitable domestic orders that provided for the support of former spouses and children which included rights to the benefits of working spouses. As a result, countless women who had contributed significantly to their families' financial well-being found themselves unable to obtain any pension benefits whatsoever upon divorce or death of the husband. To rectify this inequitable situation, Congress passed the Retirement Equity Act of 1984 which "created an express statutory exception to the prohibition on assignment and alienation in the case of distributions made pursuant to certain state orders: ERISA's spendthrift provisions are not applicable to a "qualified domestic relations order,' " *Guidry v. Sheet Metal Workers National Pension Fund* 493 U.S. 365, 376 n. 18 (1990). Domestic decrees which do not satisfy the requirements for a QDRO are not exempted and are subject to the anti-alienation provisions of ERISA. 29 U.S.C. §10-56(d)(3)(A); *Hawkins v. C.I.R.*, 86 F.3d 982, 988 (10th Cir. 1996).

The text of 29 U.S.C. §1056(d)(3)(11), (C), and (1)), setting forth the requirement and prohibitions concerning QDROs, provides as follows:

---

2. 29 U.S.C. § 1144, which includes ERISA's broad pre-emption clause provide, in relevant part, as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

*Appendix C*

§ 1056. Form and payment of benefits

(d) Assignment or alienation of plan benefits.

(3) . . .

(B) For purposes of this paragraph —

(i) the term "qualified domestic relations order" means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including community properly law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

*Appendix C*

(i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require the plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and,

(ii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

The plaintiff has made several arguments regarding the possible qualification of the Agreement as a QDRO. Specifically, plaintiff contends that the language of the relevant section of the Agreement does not satisfy the statutory

requirements necessary to be considered a QDRO; that adult children cannot qualify as "alternate payees" because the legislative history and statutory language of Section 206 establish that the purpose of the QDRO exception is to provide for former spouses and *dependent* children; and, even if the Court were to find that a QDRO existed, such a QDRO was only intended to be effective upon the death of the deceased and did not affect his rights under the Plan to a lifetime distribution of the account proceeds.

*A. QDRO Statutory Requirements*

Defendants maintain that the property settlement agreement of August 1990 satisfies QDRO requirements in regards to those provisions that address the distribution of the individual profit sharing accounts of the parties. Specifically, they argue that the language of Article 7 of the Agreement constitutes all irrevocable inter vivos assignment of the deceased's plan benefits to the children. Article 7 of the Agreement provides, in relevant part:

> The parties specifically waive any and all right that they may have in the other's employee profit-sharing plan as of the date of this agreement. *Each party shall make the "three children born of the marriage equal co-beneficiaries, per stirpes of his/her respective employee profit sharing plan.* The employee benefit plan is known as the Lighting World, Inc. Employee Sharing Trust Fund." [emphasis added].

Although the Third Circuit has not addressed this specific issue, numerous other courts have wrestled with the question

of when a domestic relations order satisfies the statutory requirements for a QDRO. *See, e.g., Hawkins v. C.I.R.*, 86 F.3d 982 (10th Cir. 1996); *Metropolitan Life Ins.* Co. *Wheaton*, 42 F.3d 1080 (7th Cir. 1994); *Hurwitz v. Sher*, 982 F.2d 778 (2nd Cir. 1991). The Court concurs with those courts who have held that all overly exacting application of the technical requirements for a QDRO should not be used to defeat either the explicit intentions of the parties or the Congressional intent to protect the rights of former spouses and children. *See, e.g., Wheaton*, F.3d at 1085.

Two of the requirements listed in 29 U.S.C. §156(d)(3)(C) — that names and addresses be included and each plan properly identified — clearly serve a notice function to "spare plan administrators from litigation-fomenting ambiguities" in administering QDROs. *Wheaton*, 42 F.3d at 1083. The Agreement clearly identifies three children as the intended beneficiaries of the deceased's benefits. Although Article 7 itself does not identify the children by name or provide their addresses, this omission is harmless in this context since as both all alternate payee and sibling to the other payees, the plan administrator — defendant Zee — was well aware of the present location of the identified parties. The misidentification of the plan to which the Agreement/QDRO applies as the "Lightning World, Inc. Employees' Sharing Fund" is similarly harmless in the present case as both parties have stipulated that the LWI Employees' Profit-Sharing Fund is the only pension plan maintained by LWI.

The designation of the children as "equal co-beneficiaries" adequately establishes that the parties intended each child to receive one-third of the subject Plan benefits and satisfies the requirement that the QDRO must specify "the amount or

percentage to be paid to each alternate payee." § 1056(d)(3)(C)(a)(ii). Although Article 7 does not explicitly state that the children are entitled to all of the benefits, the court notes that other courts have found similar language to be sufficient to support a finding that the parties intended the designated payees to receive all of the subject benefits. *See, e.g , Metropolitan Life Ins. Co. v. Person*, 805 F.Supp. 1411, 1416 (E.D. Mich. 1992).

The final requirement — that a QDRO clearly specify the number of payments or the period of payment — presents the court with a difficult question. Neither Article 7 nor other provisions of the Agreement make any mention whatsoever for the time frame for distributing the subject plan benefits or the form such a distribution should take, i.e. a lump sum, an annuity, etc. Requiring a QDRO to clearly establish the terms of distribution is a substantive provision that goes beyond mere notice to provide plan administrators with direct guidance in administering the QDRO. Those courts that have accepted contract provisions similar to the one at issue in this case generally did so in cases involving life insurance benefits or the immediate distribution of pension benefits pursuant to an alimony or child support agreement. *See, e.g., Hawkins*, 86 F.3d 982; *Wheaton*, 42 F.3d 1081; *Metropolitan Life Ins. Co. v. Benevent*, 1993 WL 437757 (S.D.N Y.); *Stott v. Bunge Corporation*, 800 F.Supp. 567 (E.D.Tenn. 1992). In either context, the timing and type of payment were evident from the circumstances and made it unnecessary for the relevant contract language to specify the terms of distribution.

The facts of the present case are somewhat more complex. The plan at issue is a profit-sharing plan under which the employee and employer made certain fixed contributions to

the deceased's account for as long as the deceased was an employee. Under the terms of the Plan, the proceeds of the deceased's individual account were distributable in one lump sum upon the occurrence of certain events — disability, retirement, termination or death. *See* Verified Amended Complaint, Exh. L. at 12-14. Defendants assert that as the substituted beneficiaries, the children are eligible to receive the benefits in lieu of the deceased upon the occurrence of any qualifying event under the plan. Had the deceased lived, remained healthy and employed — all reasonable assumptions at the time the Agreement was entered into by the parties in 1990 — the children would not have been eligible to receive the benefits for many years. Thus, to adopt the defendants' position that the deceased assigned his benefits from the moment the Agreement was signed, the court would have to find that the parties intended to convert the deceased's pension account into a quasi-trust fund for the children, a fund which continued to accrue monies and was completely inaccessible to the deceased. While the court is not prepared to determine whether a QDRO can be used for such a purpose, the court is unwilling to find that the language of Article 7 is sufficient to establish such a fundamental alteration of the deceased's pension rights in view of the clear Congressional intent to provide for the retirement security of workers. Insofar as the deceased became gravely ill and desired access to additional funds from his account to pay for medical expenses, the present case illustrates Congress' concerns with allowing workers to alienate their benefits. Even if the Agreement provided for a one-time payout or specified an amount to be distributed to the alternate payees, ends commonly accomplished by QDROs, the potential harmful effects of such a distribution would have been less severe than the complete termination of the deceased's rights to his only source of retirement income. Defendants'

contention that to fix a specific date for distribution would violate the proviso in 29 U.S.C. §1056(d)(3)(1))(i) that a QDRO not "require a plan to provide . . . any option not otherwise provided under the plan," ignores the fact that a QDRO can simply establish a "timeframe" for distribution, a generalized guideline such as the earliest retirement date permitted by the plan, which would alleviate uncertainty in its administration. The failure of the 1990 agreement to establish any parameters whatsoever for when the subject benefits should be distributed necessarily means that Article 7 fails to satisfy this substantive statutory requirement.

For these reasons, the court finds that the 1990 property settlement agreement between the deceased and defendant Linda Merling did not constitute a QDRO insofar as it purported to make a present assignment of the subject plan benefits' to the parties' three adult children from that date onward. As the court has found that the Agreement does not constitute a QDRO in any event, the court will not reach the issues of whether adult children are included in the categories of persons eligible to be "alternate payees" under 29 U.S.C. §1056(d)(3)(K) or whether a QDRO can be made effective only upon death.

In the absence of a valid QDRO, the deceased's designation of the plaintiff as his primary beneficiary is legally effective and the subject plan benefits should be distributed accordingly. Having found that the Agreement does not qualify as a QDRO, it is not required that the court reach the plaintiff's additional claim that the deceased was entitled to all inter vivos disbursement of his account proceeds which was wrongfully denied by defendant Zee in her capacity as plan administrator. However, in the interests of a complete resolution of the matter, the court will address the issues raised.

## *Appendix C*

### *B. Standard of Review for Denial of Benefits*

In reviewing a denial of benefits challenged under 29 U.S.C. §502(a)(1)(B), the court must apply a "de novo standard unless the benefit plan give the administrator or fiduciary discretionary authority to determine eligibility for benefits to construe the terms of the plan." *Firestone Tire & Rubber Co, v. Bruce*, 489 U.S. 101, 115 (1989). If the administrator has discretionary authority, then a deferential "abuse of discretion" standard applies, and the denial of benefits "will not be disturbed if reasonable." *Id.* at 11, 115; *see also Kotrostis v. GATX Corp. Non-Contributory Pension for Salaried Employees*, 970 F.2d 1165, 1175-76 (3rd Cir. 1991) (under the arbitrary and capricious standard of review, the Court's role is to determine whether a plan fiduciary's interpretation and application of plan terms was reasonable), *cert. denied*, 506 U.S. 1021 (1992); *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1186 (4th Cir. 1989)(under the deferential standard, reviewing courts may disturb the administrator's ruling "only upon a showing of procedural or substantive abuse."). This deferential standard of review obviously [will apply] if a plan contains a clear statement of discretion. *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249 (3rd Cir. 1993).

The parties in this case do not dispute that the Plan in question confers discretionary authority upon Zee to interpret and construe the terms of the Plan and to decide any and all matters arising thereunder. There, remains, however, the issue of whether the arbitrary and capricious standard should be modified in the instant case as a result of Zee's alleged conflict of interest as both the plan administrator and a potential beneficiary. Plaintiff claims such a conflict of interest would require de novo review of Zee's benefits determination.

*Appendix C*

The Supreme Court has noted that when discretion is given to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be considered as a factor in determining whether there is an abuse of discretion. *Firestone*, 489 U.S. at 115. There is an apparent conflict of interest present in the instant case. The Third Circuit has not yet established the appropriate standard for evaluating the benefits determination of a clearly self-interested plan administrator who has discretion to determine eligibility benefits. However, at least one district court within the Third Circuit has adopted the approach of the Eleventh and Sixth Circuits for addressing analogous conflicts of interests. *See Rizzo v. Paul Revere Ins., Co.*, 925 F.Supp. 302, 308-10 (D.N.J. 1996). Both Circuits have held that when a plan participant demonstrates a substantial conflict of interest on the part of the fiduciary, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted with self-interest. *See Brown v, Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990) *cert. denied*, 498 U.S. 1040 (1991); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979 (6th Cir. 1991). Both courts employed a two part analysis for conflict of interest situations. First, using a *de novo* standard the court must determine if the fiduciary's interpretation is wrong. *Brown*, 898 F.2d at 1566. Second, if the decision is found to be wrong, the court must then determine if the decision was unreasonable and therefore biased in any fashion. "Only if the administrator's decision is wrong, but apparently reasonable does the court inquire whether the 'wrong decision was tainted with self-interest.' " *Rizzo*, 935 F.Supp. at 310. Put succinctly, if the court finds that the administrator's decision was wrong but reasonable, the decision is nonetheless regarded as arbitrary and capricious if it advances the conflicting interest of the administrator/fiduciary at the expense of the affected party.

*Brown*, 898 F.2d at 1567. Plaintiff is contesting the denial of claims on two separate occasions. Therefore, the court will consider the claim details independently.

*i. Termination*

The deceased submitted a request for distribution of his account proceeds on the grounds that the May 28, 1996 Decision from the Bench by Judge McGann of the Chancery Division terminated his employment. The language of Judge McGann's decision makes it clear that the deceased was in fact terminated. See Zee Affidavit, Exh. 11. ("He is no longer an employee of the corporation"). Moreover, as of October 1996, the deceased was no longer allowed access to the company car or paid any salary. *See* Amended Verified Complaint, Exh. C. Under the terms of the Plan, a participant is eligible for a lump sum payment of the proceeds of an individual account upon termination of employment. Specifically, the Plan states:

> **Benefits Payable from Voluntary Contributions.** Each Participant shall have a fully vested and nonforfeitable right to his/her Voluntary Benefit Account. The Account Balance shall be paid to the Participant upon death, disability, or other termination of Employment in the form prescribed by in Article XIV. *See* Amended Verified Complaint, Exh. L. at 13.

Article XIV establishes that a "participant who ceases to be an employee for any reason shall be entitled to receive his nonforfeitable portion of his Account Balance. *See* Amended Verified Complaint, Exh. L at 15. Therefore, under the terms of the Plan, the deceased was clearly eligible for a disbursement oil the grounds that he had been terminated.

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Having established that the decision of the administrator was "wrong," it is next necessary to determine if that decision was "tainted with self interest." Defendant Zee denied the deceased's claim on three grounds: that the decision of the Chancery Judge was being reviewed and that any distribution before a final decision was rendered would be premature; that the deceased continued to be a director of LWI and receive company health benefits and as such was still an "employee" of the company; the Agreement/ QDRO prevented any distribution to the deceased. *See* Amended Verified Complaint, Exh. M.

The court finds that the plan administrator did not act in a self-interested manner in denying the deceased's claim. Specifically, the contentious and litigious nature of the parties' relationship (history of which the defendant was well aware) made it reasonable that the plan administrator would defer making a decision regarding a claim based upon the Chancery decision when the decision was still being challenged by the losing party. As the court has found that the plan administrator was not unreasonable for denying the deceased's claim on this basis, the court will not consider whether the other proffered explanations were legitimate.

*ii. Disability*

By letter dated December 26, 1996 the deceased requested a full disbursement of the proceeds of his individual account on the grounds that he was totally disabled under the terms of the Plan. The deceased included with his request, a copy of a radiology report and letters from a Dr. William Sloan and Dr. Linda A. Danieu confirming that the deceased suffered from pancreatic cancer and was totally medically disabled. See Amended Verified Complaint, Exh. J.

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As noted above, the Plan allows for account distributions for disability. The Plan defines disability as follows:

> **1.13 Disability**. The inability to engage in any substantial, gainful activity by reason of any medically determined physical or mental impairment that can be expected to result in death or which has lasted or which can be expected to last for a continuous period of not less than 12 months. The permanence and degree of such impairment should be supported by medical evidence. *See* Amended Verified Complaint, Exh. L, pg. 2.

From the evidence available to the decision maker, the deceased was eligible for a distribution of his individual account on the grounds that he was disabled and the defendant's decision to the contrary was "wrong." Moreover, the court finds that the defendant acted in an impermissibly self-interested manner in denying the deceased's claim. The claim denial was based upon the following reasons: that the deceased was gainfully employed in all unidentified business and was therefore not disabled within the meaning of the definition under the Plan; that the deceased was not entitled to any distribution pursuant to the terms of the alleged QDRO and that until any disputes regarding the existence of the alleged QDRO were resolved a distribution of the benefits would be premature. *See* Amended Verified Complaint, Exh. N.

Aside from stating that it had "come to [her] attention" that the deceased was employed, the defendant did not identify any evidence to support this assertion. *See* Amended Verified Complaint, Exh. N. There is no evidence that defendant engaged in any independent investigation to determine if this

employment existed at all, and if said employment was sufficiently "substantial" or "gainful" as required under the Plan definition to deny the deceased's claim. Plaintiff asserts that the deceased assisted her in the operations of her startup doll lamp business for 1-2 hours once or twice per week and was never compensated for his time. *See* Brief at 37. In addition, the court notes that the defendant did not ask for corroborating medical evidence or in any way address the medical evidence presented by the deceased in support of his claim. On the basis of the evidence in record, the defendant's decision to deny the deceased's claim for disability was both wrong and unreasonable. For these reasons, the court finds that the defendant acted on the basis of a substantial conflict of interest in breach of her fiduciary duty to execute her duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(A).

*C. Administrative Exhaustion*

Both parties have certain procedural issues which could affect the outcome of this litigation. Specifically, defendant Zee asserts that her actions were proper because as the plan administrator she was entitled under ERISA to an 18-month period of time in which to determine if the 1990 Agreement constituted a QDRO and that the deceased improperly brought the present action before allowing Ms. Zee an adequate interval of time in which to reach a final decision. In addition, although neither party directly addresses or argues the issue, there is the question of whether the present action should be barred on the grounds that the deceased failed to exhaust his administrative remedies under the Plan before bringing the instant action.

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To the extent that employees seek to enforce the terms of a plan, they must exhaust their administrative remedies before seeking judicial relief. *See Berger v. Edgewater Steel*, 911 F.2d 911, 917 (3rd Cir. 1990), *cert. denied* 499 U.S. 920 (1991); *Zipf v. American Telegraph & Telephone*, 700 F.2d 899, 891 (3rd Cir. 1986); *Wolf v. National Women*, 728 F.2d 183, 185 (3rd Cir. 1984). Exhaustion is not required, however, when resort to the administrative process would have been futile. *See, e.g., Berger*, 911 F.2d at 916; *Brown v. Continental Baking Co.*, 891 F.Supp. 238, 241 (E.D. Pa. 1995); *Tomczscyn v. Teamsters, Local 115 Health and Welfare Fund*, 590 F.Supp. 211, 213-14 (E.D. Pa. 1984). Futility requires a "clear and positive" showing that resort to the administrative process would have been unsuccessful. *Id.*

There is no question that the deceased did not exhaust his administrative remedies before seeking judicial relief. In both denial letters, defendant Zee clearly outlined an appeals process for challenging the denial of benefits. *See* Verified Amended Complaint, Exhs. M and N. The deceased did not avail himself of this process before filing the present action. Despite this significant procedural error by the deceased, resort to administrative process would have been futile for the following reasons: 1) the apparent conflict of interest of the plan administrator; 2) the failure of the plan administrator to address the medical evidence corroborating the request for disbursement on disability grounds; 3) the exigency of the deceased's medical condition; 4) and the litigious and hostile nature of the parties' relationship. The court finds that taken together these factors constitute sufficient evidence to support a finding that the deceased's failure to exhaust available administrative remedies was excused on the grounds of futility.

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Whereas the deceased is not procedurally barred from bringing this action, defendant Zee maintains, that she is procedurally protected from liability for her actions as plan administrator under §1056(d)(3)(H)(v). Specifically, §1056(d)(3)(H)(v) provides:

> (v) For purposes of this subparagraph, the 18 month period described in this subparagraph is the 18 month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

The defendant maintains that this clause allowed her to take up to 18 months from the time that the deceased first asserted a claim for disability — a distributable event under the Plan which, according to the defendants' theory, would constitute the date that a first payment would be required under the alleged QDRO/Agreement — to determine if in fact the QDRO was valid and that the defendant failed to follow the proscribed procedure for appealing her denial before filing the instant action.

The defendant is correct in her assertion that the clear intent of this section (H) is to protect plan administrators from liability for delays in administering QDROs by creating a "safe harbor" during which time the administrator may take whatever steps necessary to make a final determination of the validity of an alleged QDRO. However, this "safe harbor" provision is clearly preceded by a section which requires the plan administrator to ascertain if an alleged QDRO is valid "within a reasonable period after receipt of such order" and to "notify the participant and each alternate payee of such determination." §1056(d)(3)(G)(i)(II). There is no evidence in the record that

the defendant followed this or any of the proscribed procedures for establishing the validity of a domestic order despite the fact that the Agreement was entered into by the parties in 1990. Under the clear terms of §1056(d)(3)(G)(i), the defendant was required to begin the necessary process for establishing the 1990 Agreement as a QDRO and reach a final decision therein several years ago. A close reading of the statutory language makes clear that the "safe harbor" provision is intended to protect those administrators who are confronted with a claim pursuant to a QDRO while in the process of making this required determination:

> (H)(1) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, a court of competent jurisdiction, or otherwise) . . .
>
> (v) For purposes of this subparagraph, the 18 month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

The court finds that the defendant failed to follow the required procedures for establishing the validity and is thereby ineligible for application of the safe harbor provision. In sum, this court finds that the defendant violated her fiduciary duty as plan administrator under 29 U.S.C § 1104 by acting in a self-interested and self-serving manner in carrying out her duties. Specifically, the court finds that defendant Zee acted under the influence of a substantial conflict of interest in denying the claims of the deceased for a lifetime disbursement of the proceeds of his individual profit-sharing account.

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*Conclusion*

In light of the foregoing, the plaintiff's motion for summary judgement is granted. The defendants' cross-motion for summary judgement is denied. An appropriate Order is enclosed herewith.

## APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 23, 1997 AND FILED SEPTEMBER 24, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 97-1445 (AET)

CORINNE S. BELFER, Individually and as Executrix for the Estate of Norbert S. Belfer

Plaintiff,

v.

ELAINE ZEE, Individually and as Plan Administrator of Lighting World, Inc Employees' Profit-Sharing Plan, DELAWARE CHARTER GUARANTEE & TRUST COMPANY, Trustee of Lighting World, Inc.'s Employees' Profit-Sharing Plan, BRUCE BELFER, LINDA MERLING, MARC BELFER, and LIGHTING WORLD, INC.,

Defendants.

ORDER

For the reasons set forth in the Opinion filed even date herewith;

It is on this, 23rd day of September 1997;

ORDERED that the plaintiff's motion for summary judgment be and hereby is GRANTED; and,

*Appendix D*

IT IS FURTHER ORDERED that the defendants' cross-motion for summary judgment be and hereby is DENIED; and,

IT IS FURTHER ORDERED that the Plan Administrator and Trustee of the Lighting World, Inc. Employees' Profit-Sharing Plan be and hereby are required to pay to the plaintiff the entire proceeds of the individual account of the late Norbert Belfer with said Profit-Sharing Plan within 90 days; and,

IT IS FURTHER ORDERED that the plaintiff's requests for alternative relief be and hereby are DENIED.

s/ Anne E. Thompson
ANNE E. THOMPSON,
CHIEF JUDGE

## APPENDIX E — SUR PETITION FOR PANEL REHEARING DATED AND FILED OCTOBER 23, 1998

UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

Nos. 97-5725 & 98-5153

NORBERT S. BELFER; CORRINE BELFER,
AS EXECUTRIX OF THE ESTATE OF
NORBERT S. BELFER, DECEASED

v.

ELAINE ZEE, INDIVIDUALLY AND AS PLAN ADMINISTRATOR OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, TRUSTEE OF LIGHTING WORLD, INC. EMPLOYEES PROFIT-SHARING PLAN; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC.

Appellants No. 97-5725

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NORBERT S. BELFER, Deceased; CORINNE BELFER,
As Executrix of the Estate of Norbert S. Belfer, Deceased

v.

ELAINE ZEE, Individually and as Plan Administrator of Lighting World, Inc. Employees Profit-Sharing Plan; DELAWARE CHARTER GUARANTEE & TRUST COMPANY, Trustee of Lighting World, Inc. Employees

*Appendix E*

Profit-Sharing Plan; BRUCE BELFER; LINDA MERLING; MARC BELFER; LIGHTING WORLD, INC.

Appellants No. 98-5153

On Appeal from the United States District Court
for the District of New Jersey (D.C. No. 97-1445)

Present: NYGAARD, ALITO, and RENDELL,
*Circuit Judges*

SUR PETITION FOR PANEL REHEARING ONLY

The Appellants' Petition for Rehearing by Panel having been submitted to the judges who participated in the decision of this court, and said judges not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/ [illegible]
Circuit Judge

DATED: OCT 23 1998

## APPENDIX F — RELEVANT STATUTE

29 U.S.C.A. § 1056

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 18 — EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I — PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE B — REGULATORY PROVISIONS

PART 2 — PARTICIPATION AND VESTING

Current through P.L. 105-175, approved 5-11-98

### § 1056. Form and payment of benefits

(a) Commencement date for payment of benefits

Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which —

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

(b) Decrease in plan benefits by reason of increases in benefit levels under Social Security Act or Railroad Retirement Act of 1937

If —

(1) a participant or beneficiary is receiving benefits under a pension plan, or

(2) a participant is separated from the service and has nonforfeitable rights to benefits,

a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable under title 11 of the Social Security Act [42 U.S.C.A. § 401 *et seq.*] or the Railroad Retirement Act of 1937 [45 U.S.C.A. § 231 *et seq.*], or any increase in the wage base under such title 11, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

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(c) Forfeiture of accrued benefits derived from employer contributions

No pension plan may provide that any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply (1) to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 50 percent of such accrued benefit, or (2) to the extent that an accrued benefit is permitted to be forfeited in accordance with section 1053(a)(3)(D)(iii) of this title.

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

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(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph —

(i) the term "qualified domestic relations order" means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies —

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order —

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(E)(i) A domestic relations order shall not be treated as failing to meet the requirements of clause (i) of subparagraph (D) solely because such order requires that payment of benefits be made to an alternate payee —

(I) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(II) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(III) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

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For purposes of subclause (II), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(ii) For purposes of this subparagraph, the term "earliest retirement age" means the earlier of —

(I) the date on which the participant is entitled to a distribution under the plan, or

(II) the later of the date of the participant attains age 50 or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(F) To the extent provided in any qualified domestic relations order —

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes) of this title, and

(ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 1055(f) of this title.

(G)(i) In the case of any domestic relations order received by a plan —

(I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(ii) Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders. Such procedures —

(I) shall be in writing,

(II) shall provide for the notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan (at the address included in the domestic relations order) of such procedures promptly upon receipt by the plan of the domestic relations order, and

(III) shall permit an alternate payee to designate a representative for receipt of copies of notices that are sent to the alternate payee with respect to a domestic relations order.

(H)(i) During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this subparagraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(ii) If within the 18-month period described in clause (v) the order (or modification thereof) is determined to be a qualified domestic relations ordwer, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(iii) If within 18-month period described in clause (v)

(I) it is determined that the order is not a qualified domestic relations order, or

(II) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(I) If a plan fiduciary acts in accordance with part 4 of this subtitle in —

(i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or

(ii) taking action under subparagraph (H),

then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to such Act.

(J) A person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter a beneficiary under the plan. Nothing in the preceding sentence shall permit a requirement under section 1301 of this title of the payment of more than 1 premium with respect to a participant for any period.

(K) The term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to

receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(L) This paragraph shall not apply to any plan to which paragraph (1) does not apply.

(M) Payment of benefits by a pension plan in accordance with the applicable requirements of a qualified domestic relations order shall not be treated as garnishment for purposes of section 303(a) of the Consumer Credit Protection Act.

(N) In prescribing regulations under this paragraph, the Secretary shall consult with the Secretary of the Treasury.

(4) Paragraph (1) shall not apply to any offset of a participant's benefits provided under an employee pension benefit plan against an amount that the participant is ordered or required to pay to the plan if —

(A) the order or requirement to pay arises —

(i) under a judgment of conviction for a crime involving such plan,

(ii) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title], or

(iii) pursuant to a settlement agreement between the Secretary and the participant, or a settlement agreement between the Pension Benefit

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Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of this subtitle [section 1101 et seq. of this title] by a fiduciary or any other person,

(B) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(C) in a case in which the survivor annuity requirements of section 1055 of this title apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made —

(i) either —

(I) such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 1055(c)(2)(B)) of this title, or

(II) an election to waive the right of the spouse to a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 1055(c) of this title,

(ii) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of this subtitle [section 1101 *et seq.* of this title], or

(iii) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 1055(a)(1) of this title and under a qualified preretirement survivor annuity provided pursuant to section 1055(a)(2) of this title, determined in accordance with paragraph (5).

A plan shall not be treated as failing to meet the requirements of section 1055 of this title solely by reason of an offset under this paragraph.

(5)(A) The survivor annuity described in paragraph (4)(C)(iii) shall be determined as if —

(i) the participant terminated employment on the date of the offset,

(ii) there was no offset,

(iii) the plan permitted commencement of benefits only on or after normal retirement age,

(iv) the plan provided only the minimum-required qualified joint and survivor annuity, and

(v) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(B) For purposes of this paragraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 1002(23) of this title and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

(e) Limitation on distributions other than life annuities paid by the plan

(1) In general

Notwithstanding any other provision of this part, the fiduciary of a pension plan that is subject to the additional funding requirements of section 1082(d) of this title shall not permit a prohibited payment to be made from a plan during a period in which such plan has a liquidity shortfall (as defined in section 1082(e)(5) of this title).

(2) Prohibited payment

For purposes of paragraph (1), the term "prohibited payment" means —

(A) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements

described in the last sentence of section 1054(b)(1)(G) of this title), to a participant or beneficiary whose annuity starting date (as defined in section 1055(h)(2) of this title), that occurs during the period referred to in paragraph (1),

(B) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(C) any other payment specified by the Secretary of the Treasury by regulations.

(3) Period of shortfall

For purposes of this subsection, a plan has a liquidity shortfall during the period that there is an underpayment of an installment under section 1082(e) of this title by reason of paragraph (5)(A) thereof.

(4) Coordination with other provisions

Compliance with this subsection shall not constitute a violation of any other provision of this chapter.

(f) Missing participants in terminated plans

In the case of a plan covered by subchapter III of this chapter, the plan shall provide that, upon termination of the plan, benefits of missing participants shall be treated in accordance with section 1350 of this title.